SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 990.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

B. H. BARNES AND F. D. BARNES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print
Citation and service	a	1
Writ of error	b	1
Caption	1	2
Indictment	1	2
Order filing and submitting demurrer	7	6
Demurrer	8	6
Order filing opinion sustaining demurrer and quashing indictment	9	6
Opinion	10	7
Order allowing writ of error to Supreme Court of United States	13	8
Petition for writ of error	14	9
Assignment of errors	15	10
Clerk's certificate	17	11

a UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To B. H. Barnes & F. D. Barnes, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of United States, to be holden at the city of Washington, D. C., on the * 14th day of April next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 22nd day of March, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States of America the one hundred and thirty-fifth.

[SEAL.] WALTER EVANS, *Judge.*

Service of the above citation acknowledged this 24th day of March, 1911.

HENRY M. JOHNSON,
Attorney for Defendant in Error.

b UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Western District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between the United States of America, plaintiff, against B. H. Barnes and F. D. Barnes, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 14th day of April next, in the said Supreme Court of United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that

* Not exceeding 30 days from the day of signing.

error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of March, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States of America the one hundred and thirty-fifth.

[SEAL.]

A. G. RONALD,
Clerk of the District Court of the United States,
Western District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by
WALTER EVANS, *Judge.*

Not exceeding 30 days from the day of signing the citation.

1 Proceedings of the District Court of the United States, at a regular term begun and held at the Federal Court Hall in the city of Louisville on Monday, October 10th, A. D. 1910.

Present: Honorable Walter Evans, judge of the United States for said district.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
B. H. BARNES AND F. D. BARNES, DEFENDANTS.

Be it remembered that heretofore, to wit, on the 13th day of October, 1910, came the grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the western district of Kentucky, and returned into court the following indictment, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Kentucky, set:

In the District Court of the United States for the Sixth Judicial Circuit and Western District of Kentucky, held at Louisville, Kentucky, October term, in the year of our Lord one thousand
2 nine hundred and ten:

First count: The grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the western district of Kentucky, on their oaths present:

That on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, in the district aforesaid and within the jurisdiction of this court, B. H. Barnes and F. D. Barnes, late of said district, were persons having the superintendence of a certain building, to wit, house number 1347 Brook Street in Louisville, in the fifth internal revenue collection district of Kentucky, in which said building articles subject to internal revenue tax of

the United States were then and there kept, to wit, forty-eight packages, each containing ten pounds of colored oleomargarine and fifteen tubs of white oleomargarine, and Charles O. Reynolds was then and there a deputy collector of internal revenue within and for said collection district, and W. H. Collier was then and there a deputy collector of internal revenue within and for said collection district; and said Charles O. Reynolds and W. H. Collier, deputy collectors as aforesaid, then and there in the daytime attempted to enter said building for the purpose of examining said articles so as aforesaid subject to said tax, and that the said B. H. Barnes and F. D. Barnes then and there unlawfully did knowingly refuse to admit said Reynolds and said Collier, or either of them, into said building, or to suffer said Reynolds or said Collier to examine said articles.

Against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

R. S., sec. 3177; 3 F. S. A., 581; F. 500.

Second count: And the grand jurors aforesaid upon their oaths aforesaid do further present:

That on the twenty-ninth day of April, in the year of our
3 Lord one thousand nine hundred and ten, in the district aforesaid, and within the jurisdiction of this court, B. H. Barnes and F. D. Barnes, late of said district, were persons having the superintendence of a certain building, to wit, house number 1347 Brook Street in Louisville, in the fifth internal revenue collection district of Kentucky, in which said building articles subject to internal revenue tax of the United States were then and there kept, to wit, forty-eight packages each containing ten pounds of colored oleomargarine and fifteen tubs of white oleomargarine, and Charles O. Reynolds was then and there a deputy collector of internal revenue within and for said collection district, and W. H. Collier was then and there a deputy collector of internal revenue within and for said collection district; and said Charles O. Reynolds and W. H. Collier, deputy collectors as aforesaid, were then and there vested by law with the power and authority to enter in the daytime said building wherein said articles so as aforesaid subject to said tax were then and there kept within said collection district, and then and there in the daytime attempted to execute said power and authority vested in them by law, and to enter in the daytime said building wherein said articles subject to tax as aforesaid were then and there kept for the purpose of examining said articles;

And that said B. H. Barnes and said F. D. Barnes unlawfully and knowingly did then and there forcibly, to wit, with pistols and threats of personal violence, obstruct and hinder said Charles O. Reynolds and said W. H. Collier, deputy collectors as aforesaid, and each of them, in the execution of said power and authority so as aforesaid vested in them, and each of them, by law, to wit, in entering in the daytime said building for the purpose of examining said articles.

Against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

R. S., sec. 3177; 3 F. S. A., 581; F. 500, or 1, nm 2y.

4 Third count: And the grand jurors of the United States upon their oaths aforesaid, do further present:

That on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, in the district aforesaid, and within the jurisdiction of this court, B. H. Barnes and F. D. Barnes, late of said district, unlawfully did knowingly and willfully obstruct, resist, and oppose Charles O. Reynolds, who was then and there an officer of the United States, to wit, a duly appointed, qualified, and acting deputy collector of internal revenue within and for the fifth internal revenue collection district of Kentucky, as the said B. H. Barnes and F. D. Barnes then and there well knew, in serving and attempting to serve a certain legal writ and process, to wit, a search warrant of a United States commissioner, to wit, a certain search warrant then and there issued by Henry F. Cassin, who was then and there a United States commissioner within and for the western district of Kentucky.

That is to say, that the said Charles O. Reynolds, deputy collector as aforesaid, was, as the said B. H. Barnes and F. D. Barnes then and there well knew, then and there engaged in serving and attempting to serve and execute a certain search warrant for the search of a certain building in said collection district, to wit, house number 1347 Brook Street, in Louisville, Kentucky, which said search warrant had then and there been duly issued by Henry F. Cassin, then and there a duly appointed, qualified, and acting commissioner within and for said western district of Kentucky, and that said search warrant was then and there in full force and effect and had then and there been placed, and was then and there in the hands of said Charles O. Reynolds, deputy collector as aforesaid, for execution, and the said Charles O. Reynolds, deputy collector as aforesaid, was then and there a person duly authorized to serve and execute said search warrant, which said search warrant was and is of the tenor following, to wit:

5 "UNITED STATES OF AMERICA,
"*Western District of Kentucky, sct.:*

"*Search warrant.*

"*To Charles O. Reynolds, general deputy collector of the internal revenue of the United States for the 5th internal revenue collection district of Kentucky:*

"Whereas complaint on oath and in writing has this day been made before me, Henry F. Cassin, a United States commissioner for said district, by Charles O. Reynolds, general deputy collector of internal revenue for the 5th collection district of Kentucky, alleging that he has reason to believe, and does believe, that a fraud upon the

revenue of the United States is being committed upon and by the use of certain premises, to wit, a certain 2½-story brick building with frame addition, and with cellar, being numbered 1347 Brook Street, located on the east side thereof, and between Ormsby and Woodbine Streets, and a one-story frame shed in the rear of said house; that in one of said buildings the Park Butter Company, a corporation created and existing by and under the laws of the State of Kentucky, has posted and displayed its special tax stamp issued to it as a retail dealer in colored oleomargarine, and said buildings are used as a place of business by said Park Butter Company as a retail dealer in oleomargarine, and for loading wagons with oleomargarine throughout said city, and that B. H. Barnes is the managing officer of said corporation, and conducts and has charge of said business of retail dealer in oleomargarine for and on behalf of said corporation, being situate in the city of Louisville, State of Kentucky, and within the district above named.

"You are therefore hereby commanded, in the name of the President of the United States, to enter said premises with the necessary and proper assistance and there diligently to investigate and search into and concerning said fraud, and to report and act concerning the same as required by law.

"Given under my hand this 28th day of April, 1910.

6 [SEAL.] "HENRY F. CASSIN,
"*United States Commissioner,*
"*Western District of Kentucky.*"

And so the grand jurors aforesaid, upon their oaths aforesaid, present that on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and ten, the said B. H. Barnes and F. D. Barnes unlawfully did knowingly and willfully obstruct, resist, and oppose an officer of the United States, and a person duly authorized, in serving and attempting to serve and execute a legal writ and process of a United States commissioner in manner and form as in this count aforesaid.

Against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Cr. Code, 140; 5 F. S. A., 384; F. nm 300 and 1 nm 1 y.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky.

Witnesses:
L. T. MCCLURE,
M. RAY YARBERRY,
E. J. WELLS,
W. H. COLLIER,
C. O. REYNOLDS.

7 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
B. H. BARNES AND F. D. BARNES, DEFENDANTS.

And on another day of said term of said court continued and held, to wit, on February 23rd, 1911.

This day came the district attorney. Came also the defendants by Johnson & Hieatt, their attorneys, and filed a demurrer to the indictment herein and said demurrer coming on to be heard was argued by counsel, and the court, not being advised thereof, takes time. Came again the district attorney and announced to the court that he was unwilling to further prosecute the defendants upon the third count of this indictment. It is therefore considered and adjudged by this court that said third count be not prosecuted but with leave to the district attorney to resubmit charge to another grand jury.

The demurrer above referred to is as follows:

8 United States of America, for the Western District of Kentucky.

UNITED STATES, PLAINTIFF,
vs.
B. H. BARNES AND F. D. BARNES, DEFENDANTS. #7557.

Demurrer.

Come, B. H. Barnes and F. D. Barnes, by Johnson and Hieatt, their attorneys, and demur to this indictment against them, and each count of same, to wit, the first count, the second count, and the third count, on the ground that said indictment, nor any of the counts thereof do not state or allege facts against defendants sufficient to charge them or either of them with having committed any offense against the laws of the United States or to constitute a crime against the United States.

JOHNSON & HIEATT,
Att'ys.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
B. H. BARNES AND F. D. BARNES, DEFENDANTS.

And on another day of said term of said court continued and held, to wit, on February 24th, 1911.

9 The court being now sufficiently advised of the questions arising on the demurrer of the defendant*d* to the first and second counts of the indictment herein delivered an opinion in writing, which is filed, and pursuant thereto it is considered, ordered, and adjudged that each of said counts is insufficient in law, and the demurrer

to each of them is therefore sustained, to which the United States of America excepts. It is further ordered and adjudged that the indictment should be, and the same accordingly is, quashed and set aside, to which the said United States of America also excepts.

The opinion above referred to is as follows:

10 United States District Court, Western District of Kentucky.

Not to be reported.

UNITED STATES
vs.
B. H. BARNES AND OTHERS.

Opinion.

The third count of the indictment has been nollied, and the demurrer of the defendant to the first and second counts is now to be disposed of.

It seems to the court to be quite clear that the averments of each are sufficient to bring those counts within the language of section 3177 of the Revised Statutes. But the contention of the learned counsel for the defendant is that the demurrer must nevertheless be sustained because that section was not made part of the laws applicable to any case growing, as this does, out of the provisions of an act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine, approved August 2, 1886. (24 Stats., 209; 2 Comp. Stats., 2228.) Section 3 of that act, so far as it is necessary to state its provisions, is as follows:

"That special taxes are imposed as follows:

"Manufacturers of oleomargarine shall pay six hundred dollars * * *.

"Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars * * *.

"Retail dealers in oleomargarine shall pay forty-eight dollars * * *.

"And sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240,
3241, and 3243 of the Revised Statutes are so far as applicable,
11 made to extend to and include and apply to the special taxes
imposed by this section and to the persons upon whom they are imposed."

It will be observed that while the Commissioner of Internal Revenue is charged with the administration of the act, the act itself is not, in terms, made part of the previously existing internal revenue laws, except to the extend indicated by the provisions of section 3, which we have copied. If nothing whatever had been said about the internal revenue statutes the matter would have been clear enough, and section 3177 would have spoken for itself just as it would have done if all the previously existing statutes had been expressly made

applicable. As it is, however, Congress industriously and in express terms made certain definitely stated provisions of those laws applicable, with the result that the plain rules of statutory interpretation require that all provisions shall be regarded as having been excluded under the familiar maxim, inclusio unius est exclusio alterious.

The oleomargarine statute was very carefully considered by this court in Schafer vs. Craft, 144 Fed., 908, and the conclusion was reached that Congress plainly indicated that section 3176 should not apply to oleomargarine cases. This ruling was affirmed by the Circuit Court of Appeals in Craft vs. Schafer, 153 Fed., 175. On a reconsideration (154 Fed., 1002) the latter court so far modified the language of its original opinion therein as to limit it to section 3176, which indeed was the only one there involved, and so as to leave open the question as to the applicability to the oleomargarine act of any other section of the Revised Statutes. But the reason given by the court for excluding section 3176 was that it was not included by Congress in the express enumeration of the provisions of the general laws which were made applicable to the oleomargarine act by section 3 thereof. We know of no reason upon which we could base
12 a different conclusion in this case, as the reason given in all the opinions apply as perfectly to section 3177 as they do to section 3176. We are unable to see any principle upon which we can differentiate the two cases. And the reason for excluding any of the other provisions of the Revised Statutes, except those enumerated in section 3 of the oleomargarine act, is emphasized by the failure of Congress to amend that section after the judicial construction given to it by the Circuit Court of Appeals of this circuit, and after a similar one announced by the Circuit Court of Appeals of the Eighth Circuit, in Tucker vs. Grier, 160 Fed., 611. In the latter case the court went quite fully into the question, and reached a conclusion precisely similar to that stated in Craft vs. Schafer, supra, and affirmed the ruling of Judge Rogers, reported in 150 Fed., 658.

Under these circumstances (even if it were a case where this court would feel at liberty to disregard analogies) we have no doubt that the demurrer to each of the counts under consideration should be sustained.

A judgment accordingly may be entered with exceptions to the United States.

WALTER EVANS, *Judge.*

FEBRUARY 24TH, 1911.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
B. H. BARNES AND F. D. BARNES, DEFENDANTS.

And at another term of our said court held for its March term, 1911, continued and held, to wit, on March 17th, 1911.

13 This day came the plaintiff, The United States of America, by George Du Relle, United States attorney for the western

district of Kentucky, and presented to the court its petition for a writ of error and assignment of errors, and on consideration whereof it is now ordered that said petition and assignment of errors be filed and a writ of error be, and is hereby, allowed to have reviewed in the Supreme Court of the United States the judgment and proceedings heretofore entered and had herein.

The petition for writ of errors and assignment of errors above referred to is as follows:

14 United States of America, Western District of Kentucky, at Louisville.

UNITED STATES OF AMERICA
vs.
B. H. BARNES; F. D. BARNES. } No. 7557.

Petition for writ of error.

And now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and says that on the 24th day of February, 1911, this court entered judgment herein in favor of said defendants against said plaintiff, and rendered a decision and judgment sustaining a demurrer to the first and second counts of the indictment herein, and quashing said counts of said indictment, which said decision and judgment was and is based upon the construction of the statutes upon which said counts of said indictment were founded, to wit, section 3177 of the Revised Statutes of the United States and the act of Congress entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, and the acts amendatory thereto, in which decision and judgment and proceedings certain errors were committed to the prejudice of the United States, all of which will more in detail appear in the assignment of errors which is filed with this petition.

Wherefore, the said United States prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
United States Attorney, Western District of Kentucky,
Attorney for Plaintiff in Error.

United States of America, Western District of Kentucky, at Louisville.

UNITED STATES OF AMERICA
vs.
B. H. BARNES; F. D. BARNES. } No. 7557.

Assignment of errors.

Afterwards, to wit, on the seventeenth day of March, A. D. 1911, comes the United States of America, plaintiff in error, by George DuRelle, attorney of the United States, and says that in the record and proceedings in the above-entitled cause in the United States district court for the Sixth Circuit and Western District of Kentucky, there is manifest error in this, to wit:

1. In deciding and adjudging that the proper construction of the statutes of the United States, and particularly of section 3177 of the Revised Statutes of the United States, and of the act of Congress entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, and the amendments to said act, requires the court to hold, and, upon that ground, in holding and deciding and adjudging that section 3177 did not, and does not, apply to cases arising under said act of August 2, 1886, and the amendments thereto, and in holding and deciding and adjudging that neither the first nor the second count contained in the indictment herein states an offense against the United States.

2. In deciding and adjudging that neither the first nor the second count contained in the indictment herein states an offense against the United States for the reason that the act entitled "An act
16 defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, does not refer to or make section 3177 of the Revised Statutes applicable to matters referred to in said act of August 2, 1886, which decision is based upon the construction of said statutes of the United States.

3. In deciding and adjudging that the first and second counts of the indictment herein are, and each of them is, insufficient, which decision and judgment is based upon the construction of the statutes of the United States upon which said indictment is founded, to wit, section 3177 of the Revised Statutes of the United States, and an act entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886.

4. In deciding and adjudging that the demurrers to the first and second counts of the indictment herein be, and each of them is, sustained, which decision and judgment is based upon the construction of the statutes of the United States, upon which said indictment is founded, to wit, section 3177 of the Revised Statutes of the United

States, and the act of Congress entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886.

5. In deciding and adjudging that the first and second counts of the indictment herein be, and each of them is, quashed; which decision and judgment is based upon the construction of the statutes of the United States, upon which indictment is founded, to wit, section 3177 of the Revised Statutes of the United States and the act of Congress entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886.

GEORGE DURELLE,
U. S. Attorney, Western District of Kentucky,
Attorney for Plaintiff in Error.

17 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing sixteen pages contain a true and correct transcript of the record and proceedings had in the case of United States of America against B. H. Barnes and F. D. Barnes, No. 7557, as the same appears from the files and records in my said office.

Witness my hand and seal of said court at Louisville, Kentucky, this 1st day of April, 1911.

[SEAL.]

A. G. RONALD, *Clerk.*
By HENRY F. CASSIN, *Deputy Clerk.*

(Indorsement on cover:) File No. 22611. W. Kentucky, D. C., U. S. Term No. 990. The United States, plaintiff in error, vs. B. H. Barnes and F. D. Barnes. Filed April 8th, 1911. File No. 22611.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
D. H. BARNES AND F. D. BARNES. } No. 990.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and assign it for hearing during the next term.

As a number of cases in which the Government is interested have already been advanced to be heard in October next, it is suggested that this case be assigned for hearing at such later date during the coming term as may be convenient to the court.

The writ of error in this case was sued out under the provisions of the criminal appeals act of March 2, 1907 (34 Stat., 1246), from a judgment of the district court sustaining a demurrer to the first and second counts of the indictment against the defendants (R., 6), a nolle prosequi having been entered as to the third count thereof (R., 7).

The first and second counts of the indictment (R., 2, 3) charged the defendants with forcibly obstructing entrance by deputy collectors of internal revenue to a building where oleomargarine subject to internal-revenue tax was kept, in violation of the provisions of section 3177 of the Revised Statutes.

The demurrer was sustained by the district court upon the ground that, as section 3177 is not expressly made applicable to the collection of internal-revenue taxes on oleomargarine, that section does not apply in such cases (R., 7, 8).

The Secretary of the Treasury states that his department is embarrassed in the administration of the internal-revenue laws in oleomargarine cases by this decision, and it is deemed important that the question should be authoritatively decided at an early date.

The criminal appeals act requires that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases."

This motion to advance is therefore respectfully submitted.

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
Solicitor General.
WILLIAM R. HARR,
Assistant Attorney General.

MAY, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
B. H. BARNES AND F. D. BARNES.
} No. 565.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The writ of error in this case was sued out under the provisions of the criminal appeals act of March 2, 1907 (34 Stat., 1246), from a judgment of the district court sustaining a demurrer to the first and second counts of the indictment against the defendants (R., 6), a nolle prosequi having been entered as to the third count thereof (R., 7).

The first and second counts of the indictment (R., 2, 3) charge the defendants with forcibly obstructing entrance by deputy collectors of internal revenue to a building where oleomargarine subject

to internal-revenue tax was kept in violation of the provisions of section 3177 of the Revised Statutes.

The demurrer was sustained by the district court upon the ground that section 3177 does not apply to the collection of internal-revenue taxes on oleomargarine (R., 7–8).

STATUTES.

Section 3177 of the Revised Statutes, a vialotion of which is charged in the indictment, reads as follows:

> SEC. 3177. Any collector, deputy collector, or inspector may enter in the daytime any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, for-

feit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court.

Section 8 of the oleomargarine act of August 2, 1886, as amended by the act of May 9, 1902 (32 Stat. 193, 194), reads as follows:

> SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

Section 3 of the oleomargarine act of August 2, 1886 (24 Stat., 209), contains the following provisions (italics mine):

> SEC. 3. That *special* taxes are imposed as follows:
>
> Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the *special* taxes imposed by this section, and to the persons upon whom they are imposed * * *.

ASSIGNMENTS OF ERROR.

The assignments of error (R., 10), in substance, challenge the correctness of the court's ruling that section 3177, upon which the indictment was based, is inapplicable to the collection of the internal-revenue tax on oleomargarine imposed by the act of August 2, 1886.

ARGUMENT.

I.

OLEOMARGARINE IS AN "ARTICLE OR OBJECT SUBJECT TO TAX" TO WHICH SECTION 3177 OF THE REVISED STATUTES APPLIES, AND THERE IS NOTHING IN THE OLEOMARGARINE ACT TO WARRANT ITS EXCLUSION.

Section 3177 authorizes the revenue officers to enter, in the daytime, "any building or place where *any* articles or objects subject to tax are made, produced, or kept," for the purpose of examining said articles. By section 8 of the oleomargarine act, above quoted, oleomargarine is subjected to a certain tax. Any place where it is made, produced, or kept is therefore within the general scope of section 3177.

The district court, however (in a brief opinion which does not contain any discussion either of the oleomargarine act or the internal-revenue statutes as a whole, or of the specific sections of the Revised Statutes applied by section 3 of the oleomargarine act to the "special" taxes thereby imposed), held that because Congress had "industriously and in express term made certain definitely stated provisions of those laws applicable" section 3177 must

be regarded as having been excluded under the familiar maxim *inclusio unius est exclusio alterius.* (R., 7, 8.)

An examination of the oleomargarine act and of the various provisions of the Revised Statutes involved shows that the court has fallen into grave error upon this point.

Section 3 of the oleomargarine act, after imposing certain "special" taxes upon manufacturers of and wholesale and retail dealers in oleomargarine, provides that sections 3232 to 3243 of the Revised Statutes (omitting section 3242) shall, so far as applicable, "extend to and include and apply to the *special* taxes imposed by this section, and to the persons upon whom they are imposed."

The sections so applied are embraced in Title XXXV, Chapter 3, of the Revised Statutes, said chapter being entitled "Special Taxes." They are all provisions relating to the conduct of the trades or businesses upon which special taxes are imposed.

It is to be observed at the outset that the provisions of the Revised Statutes referred to in section 3 of the oleomargarine act are applied only to the *special* taxes imposed by that section upon manufacturers of and wholesale and retail dealers in oleomargarine. They are not applied, and of course could not be applied, because entirely inapplicable, to the tax imposed by section 8 of the act upon the article oleomargarine. As to the collection of the latter tax, therefore, there is no room for the application of the rule *inclusio unius est exclusio*

alterius, relied upon by the court. On the contrary, the fact that Congress expressly applied the sections of the Revised Statutes referred to only to the special taxes imposed by section 3 of the act, by the operation of the very rule relied on by the court, excludes their application, *and any inference arising from their application*, to the tax upon oleomargarine imposed by section 8 of the act.

The reason for expressly applying the provisions of the Revised Statutes relating to special or occupation taxes " to the special taxes imposed by that act, and to the persons upon whom they are imposed " is apparent when the nature of the oleomargarine act is considered. In that act Congress had undertaken to regulate, at length and in detail, the manner in which the business of manufacturing and selling oleomargarine should be conducted. Therefore it might well have been thought that, unless the provisions of the Revised Statutes regulating the conduct of trades and businesses upon which special taxes are imposed were expressly applied, they would be held by those in charge of the administration of the act, as well as by the courts, not to apply to manufacturers of and dealers in oleomargarine.

While, however, the oleomargarine act does undertake to regulate, for the purpose of taxation, the manufacture and sale of oleomargarine, and while that act prescribes penalties and punishment for failure to observe such provisions, and to this extent may be regarded as complete in itself, and

therefore no general statutes upon those subjects should be held to apply unless expressly made applicable, a different condition exists with respect to the collection of the taxes imposed by that act. This necessarily results from the failure of Congress to provide any other system than the existing one for the collection of the taxes which it imposes upon manufacturers of and dealers in oleomargarine, and for the prevention of frauds in respect to the businesses and article taxed. It is manifest from a reading of the act that Congress intended it should take its place among the other statutes for raising revenue and be enforced by the internal-revenue officers in the same manner as other taxing statutes. Internal-revenue officers and agents as well as collection districts are referred to and assumed to exist. In a few instances such officers are given certain specific powers, but these, it is to be presumed, were intended to be in addition to those otherwise possessed by them. Thus, section 5 of the act provides—

> that every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of materials and products, shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the

> approval of the Secretary of the Treasury, may, by regulation, require.

While section 13 provides that—

> any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

But by conferring such special and limited authority upon the internal-revenue officers in respect to the manufacture or sale of oleomargarine, Congress can not be held to have intended to deny them the ordinary powers possessed by them as revenue officers.

Section 3163 of the Revised Statutes, defining the duties of collectors and agents of internal revenue, as amended in 1879, provides that—

> every collector, within his collection district, and every internal-revenue agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.

Section 3166 provides that—

> any officer of internal revenue may be specially authorized by the Commissioner of Internal Revenue to seize any property which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors; and such special authority shall be limited in respect of time, place, and kind

> and class of property, as the commissioner may specify.

So, also, in furtherance of the purpose of Congress to compel compliance with the taxing statutes and to prevent fraud upon the revenue, section 3177 of the Revised Statutes, under which the indictment in this case was found, provides that—

> any collector, deputy collector, or inspector may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects.

That section also authorizes such officers to enter such premises at night, when open, in the performance of their official duties.

Section 3183 provides that it shall be—

> the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

Section 3187 provides that—

> if any person liable to pay *any* taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five percentum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided.

Section 3196 provides that—

> when goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate.

Clearly, in the absence of any provision in the oleomargarine act expressly or by clear implication negativing the view, these general powers and duties of the revenue officers must be held to apply in the enforcement of that act.

The mere fact that Congress, in section 3 of the oleomargarine act, imposing special taxes upon manufacturers of and wholesale and retail dealers in oleomargarine, expressly applied certain provisions of the Revised Statutes relating to the conduct of occupations upon which special taxes were imposed to "the special taxes imposed by this section, and to the persons upon whom they are imposed," certainly seems to afford no authority for holding that the internal-revenue officers are to be prevented from exercising the authority conferred upon them by law for the purpose of enforcing the collection of all taxes imposed by law and to detect and prevent frauds upon the revenue. Nor can the fact that the act expressly conferred certain limited authority upon the revenue officers, as above pointed out, be held to have such a result. To hold otherwise is to say that the oleomargarine business alone is to be exempted from the necessary and salutary provisions of the law for the enforcement of

internal-revenue taxes and the prevention of fraud in respect thereto. The untoward results of such an interpretation of the law is manifest, and it would seem that we have here a striking case for the enforcement of the elementary rule of statutory interpretation that "where great inconvenience will result from a particular construction that construction is to be avoided, unless the meaning of the legislature be plain." (*United States* v. *Fisher*, 2 Cranch, 386.)

As stated, the oleomargarine act indicates on its face that the general provisions of law for the collection of the taxes imposed were intended to apply. For instance, in sections 17 and 18 it provides for the forfeiture of oleomargarine for fraud or failure to comply with the law, and in section 19 that all fines, penalties, and forfeitures imposed by the act may be recovered in any court of competent jurisdiction. It is absurd to contend, therefore, that the collector and his deputies would not have authority, under the general provisions of the Revised Statutes above quoted, to seize such forfeited goods, such seizure being an essential prerequisite to the jurisdiction of the court of an information *in rem* to declare the forfeiture. (*The Brig Ann*, 9 Cranch, 289.)

Upon principle, as well as because of the untoward consequences referred to, the oleomargarine act of 1886, being a revenue act (*In re Kollock*, 165 U. S., 526, 536), should be construed together with the general statutes relating to collection of and

the prevention of frauds upon the revenue, especially as it contains no adequate provisions on that subject and would be practically inoperative otherwise.

The same principle applies to the internal-revenue laws as to the tariff revenue system, concerning which this court, in *Saxonville Mills* v. *Russell* (116 U. S., 13, 21), said:

> It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress.

II.

DEPARTMENTAL CONSTRUCTION IN ACCORDANCE WITH CONTENTION THAT GENERAL INTERNAL-REVENUE STATUTES APPLY IN OLEOMARGARINE CASES.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has uniformly held, ever since the passage of the oleomargarine act of 1886, that the general internal-revenue statutes are applicable to the collection of the internal-revenue taxes levied by that act upon oleomargarine and the business of its manufacture and sale.

In Treasury Decisions, Internal Revenue, No. 1266, the Commissioner of Internal Revenue states:

> This office has always held that the administrative features of the internal-revenue law in regard to the collection of taxes, examination of premises, etc., apply to oleomargarine as well as to other taxable articles.

It is a rule well established that the construction given to a statute by those charged with the duty of executing it will be given great weight by the court if the true construction be doubtful. (*United States* v. *Hammers,* 221 U. S., 220, 228.)

An opinion was also rendered by the Attorney General, holding that section 3229 of the Revised Statutes, one of the general internal-revenue statutes, authorizing the compromise of internal-revenue cases, applies to the internal-revenue taxes provided for in the oleomargarine laws. (26 Op. A. G., 282.)

III.

AUTHORITIES HOLDING GENERAL INTERNAL-REVENUE STATUTES APPLICABLE IN OLEOMARGARINE CASES.

The construction of the oleomargarine act contended for by the Government was upheld by the District Court of the United States for the Eastern District of Michigan in *United States* v. *Thomas Fitzsimmons* (not reported), this being the only other case known to the Government in which a court has given consideration to the applicability of section 3177 in oleomargarine cases. Not being

reported, it is recognized that the only value of this case is for the argument it contains.

In that case the defendant was indicted for obstructing an internal-revenue officer in his inspection of an oleomargarine factory, in violation of section 3177 of the Revised Statutes. It was contended, as it is in this case, that the oleomargarine act is separate and distinct from the general internal-revenue statutes, and that, as no specific section of that law provided for the offense charged, an indictment would not lie. The case was tried October 19, 1909, and a verdict of guilty rendered. A motion for a new trial was denied, and the defendant, on April 9, 1910, was sentenced to pay a fine of $500, which was paid on the same day.

District Judge Swan, in his charge to the jury in that case, referring to section 3177, said:

> This statute is part of the system of laws known as the internal-revenue laws, which doubtless you know, but it is well to remind you that that system of laws was enacted for the purpose of securing revenue to the Government for paying Government expenses, and also the further object is to secure the proper conduct and regulation of the operation of what are known as factories for the manufacture of oleomargarine or stores where such article is offered for sale or kept, by the laws of the United States regulating this dealing in oleomargarine, which are part of the system of internal-revenue laws. As provided by the Congress of

the United States, oleomargarine is subject to a tax. That tax is imposed for the purpose of supplying revenue for the Government and for the purpose of protecting the customers against adulteration of that class of goods and for the third purpose of protecting the honest dealer who complies with the provisions of law against competition of unfair dealers who refuse to comply and violate the law in any particular. Now, for the purpose of enforcing that law and securing its objects, it is provided by law under the act of 1900 that the collector of internal revenue is authorized to detail deputies from one district to go into another district and deputies from other districts to go to this district, as well as deputies for the district for which they are appointed. You will likely recall for a moment, section 3177, that section of the law which I read; you will readily see the purpose for which the right of entry upon places for examination where the article called oleomargarine is either made, sold, or kept and the authority given to the officers to make such examination. The collector of internal revenue does not exercise the authority personally, but his deputies do it, and the deputies are appointed by the Commissioner of Internal Revenue, who has that authority from the United States.

This construction of the statutes in question is also supported by an opinion of the Circuit Court for the District of New Jersey in *Hastings* v. *Herold* (184 Fed., 759). That was a suit for the re-

covery of internal-revenue taxes alleged to have been illegally assessed upon oleomargarine. It was instituted under the provisions of sections 3220 and 3226 of the Revised Statutes, which sections are a part of the general internal-revenue laws and provide generally for the refund of internal-revenue taxes illegally assessed. District Judge Cross, holding these sections applicable to taxes on oleomargarine, said (p. 762):

> The sections of the internal-revenue law, incorporated into the oleomargarine act, relate simply and solely to the imposition of the special taxes therein referred to, and the persons upon whom they were to be imposed. The procedure requisite under sections 3220 and 3226, for the return of taxes and penalties, was independent subject matter, and their applicability to the oleomargarine act was in nowise impaired or modified, in my judgment, by the fact that they were not specifically referred to, although other sections were. There is nothing in that act repugnant to sections 3220 and 3226. No method for the return or for a suit for the recovery of taxes and penalties illegally imposed is provided or even referred to in that act. Section 3226 was intended to, and does, in specific terms, apply to all cases like the one at bar, and is of such a comprehensive character that its provisions can not be disregarded in any case coming within its purview, until Congress shall have otherwise expressly provided.

This language applies with equal force to the provisions of section 3177. There is not in the oleomargarine legislation anything repugnant to the application of section 3177 or any provision to take its place in oleomargarine cases. Like section 3226, under consideration by the court in the above opinion, section 3177 " was intended to, and does, in specific terms, apply to all cases like the one at bar, and is of such a comprehensive character that its provisions can not be disregarded in any case coming within its purview, until Congress shall have otherwise expressly provided."

Applying, as section 3177 does in express terms, to the case at bar, it is sufficient to quote from the decision of this court in *Rosencrans* v. *United States* (165 U. S., 257, 262), where it was said that—

> * * * where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. * * *

IV.

OTHER DECISIONS INAPPLICABLE OR ERRONEOUS.

The District Court cites in support of its conclusion *Schafer* v. *Craft* (144 Fed., 908; 153 Fed., 175; 154 Fed., 1002) and *Tucker* v. *Grier* (150 Fed.,

658; 160 Fed., 611), saying, as to the former decision (R., 8), that—

> * * * the reason given by the court for excluding section 3176 was that it was not included by Congress in the express enumeration of the provisions of the general laws which were made applicable to the oleomargarine act by section 3 thereof. We know of no reason upon which we could base a different conclusion in this case, as the reasons given in all the opinions apply as perfectly to section 3177 as they do to section 3176. We are unable to see any principle upon which we can differentiate the two cases.

The Circuit Court of Appeals in that case seems not to have been clearly of the same opinion. Reconsidering and limiting its opinion that court said (154 Fed., 1002–1003):

> * * * It was only necessary for us to pass upon the applicability of section 3176, and to this we think our opinion should be limited. There are a number of reasons why section 3176 can have no applicability which might not obtain with reference to some other section of the general law.

Section 3176, under consideration in that case, authorizes the Commissioner of Internal Revenue, under certain conditions, to make assessments and add certain penalties thereto. The Circuit Court in its opinion in that case (144 Fed., 907, 909), while relying upon the fact that this section is not

among those enumerated in section 3, points out nevertheless that certain penalties and the manner of their enforcement are expressly provided for in other sections of the oleomargarine act.

There is no provision in that act prescribing in oleomargarine cases the punishment attached by section 3177 to obstructing internal-revenue officers in the performance of their duties, nor any attempt to cover, with any degree of adequacy, the subjects of the collection of the taxes imposed or the prevention of fraud in respect thereto. This decision is therefore inapplicable to the case at bar.

Besides, in that case the question presented was whether the general internal-revenue statute applied to the *special* taxes imposed by section 3 of the oleomargarine act upon manufacturers and dealers in oleomargarine, whereas in the present case the general statute is sought to be applied to the tax imposed by section 8 on the article oleomargarine.

In *Tucker* v. *Grier* (150 Fed., 658; 160 Fed., 611), the other case relied upon by the District Court in its opinion in the present case, sections 3176, 3187, 3220, and 3226 were held inapplicable to the *special* taxes prescribed by section 3 of the oleomargarine act. For that reason the *Tucker case* has no application to the question now under consideration whether a general statute applies to the specific tax imposed by section 8 on the article oleomargarine.

Furthermore, that decision proceeds upon an erroneous assumption. The District Court in its opinion (150 Fed., 658, 662), adopted without change by the Circuit Court of Appeals (160 Fed., 611, 615), in support of its conclusion that the oleomargarine act establishes its own complete system, refers to several sections of the oleomargarine law for which it says there would be no need if the general internal-revenue statutes apply in such cases.

The force of this argument is lost immediately upon examination of the language of the general internal-revenue statutes to which the court refers in this connection. Sections 3303 and 3304, by their express terms, apply only to distillers; section 3318 only to rectifiers and wholesale liquor dealers; sections 3337 and 3338 only to brewers; sections 3357, 3358, and 3375 only to manufacturers of snuff and tobacco; and sections 3257, 3324, and 3296 only to distilled spirits. With but a single exception (section 3213, conferring upon the courts jurisdiction as to fines and penalties), the sections of the Revised Statutes referred to by the court as general in their application are provisions applicable by their terms to some particular taxed object and are not a part of the general revenue machinery.

In re Kearns (64 Fed., 481), not cited by the District Court, but holding section 3173 of the Revised Statutes, providing for the compulsory production of books, inapplicable in an oleomargarine

case, is likewise immaterial here, for the reason that the tax to which section 3173 was held inapplicable was the special tax levied under section 3 and not the specific tax imposed by section 8.

In re Kinney (102 Fed., 468) it was merely held that the provisions of section 3173, authorizing the collector to summon before him for examination any person charged by law with the duty of paying any tax or having charge of any property or object liable to a tax, do not apply to persons required under the oleomargarine act to make returns of materials or products. Such sections, it was held, related only to objects of taxation upon which the tax is collected by the method of return and assessment, and not to those upon which tax was required to be paid by stamp. Whether this view be correct or not, it has no application to the case at bar, which arises under a general statute not limited to any specific mode of taxation.

In the *Kinney case* the court refers to *United States* v. *Mann* (95 U. S., 580, 587), where is was held that " paid bank checks, *unless it is alleged and proved that they were not duly and sufficiently stamped at the time they were made, signed, and issued,* are not articles or objects subject to taxation " within the meaning of section 3177 of the Revised Statutes, and that a person might lawfully refuse to suffer a collector to examine them though that section provided that a collector might enter upon the premises to examine articles subject to tax.

The ruling of this court in the *Mann* case proceeds upon the assumption that section 3177 is general in its nature and applies as well to articles which are subject to a stamp tax as to articles by which tax is to be collected by way of return and assessment. We are not concerned here with the matter of pleading dealt with by the court in that case.

For the reasons stated the decision of the District Court should be reversed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

OCTOBER, 1911.

O

No. 565.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

THE UNITED STATES, - - - *Plaintiff in Error,*

vs.

B. H. BARNES AND F. D. BARNES, - *Defendants in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

Brief for B. H. Barnes and F. D. Barnes, Defendants in Error.

HENRY M. JOHNSON,
Attorney for Defendants in Error.

JOHNSON & HIEATT,
Of Counsel.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1911.

No. 565.

THE UNITED STATES, - - - - - *Plaintiff in Error,*

vs.

B. H. BARNES AND F. D. BARNES, - *Defendants in Error.*

In Error to the District Court of the United States for the Western District of Kentucky.

BRIEF FOR B. H. BARNES AND F. D. BARNES,
DEFENDANTS IN ERROR.

STATEMENT.

This case involves a single *legal* proposition, namely, the applicability of Section 3177, Rev. St. of U. S., to the administration of the Oleomargarine Law.

Section 3177 is as follows:

"Section 3177. OFFICERS MAY ENTER PREMISES WHERE TAXABLE ARTICLES ARE KEPT.—Any collector, deputy collector or inspector may enter, in the day-

time, any building or place where any *articles* or *objects* subject to tax are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court."

Act June 30, 1864, c. 173, 37, 38, 13 Stat. 238.

(The italics in above are ours.)

Observe this section refers only to places where *articles* or *objects* subject to tax are. The section also imposes (a) a heavey penalty upon any person who *refuses to admit* an officer to said place, and (b) a heavy penalty or imprisonment sentence upon any person who *forcibly obstructs* or *hinders* such officer.

Defendants in error, B. H. Barnes and his wife, F. D. Barnes, were indicted under an indictment containing three counts. The first two counts were based on the

above section and charged that defendants had oleomargarine on their premises, and in the first count that they *refused* to *admit* the officers, and in the second count that they *forcibly obstructed* and *hindered* the officers.

The third count charged defendants with obstructing, resisting and opposing an officer who was attempting to serve a search warrant. Defendants demurred to the three counts of the indictment. The district attorney declined to prosecute defendants on the third count, so the demurrer was heard to the first and second counts. Defendants' point urged in support of their demurrer was that Section 3177, Rev. Stats. U. S., the section under which the counts were drawn, had no applicability to the administration of the Oleomargarine Law. The court sustained defendants on their point and wrote quite an extended opinion sustaining their demurrer. (See Record, p. 7, for opinion.) The Government has appealed from the judgment of the court sustaining defendants' said demurrer.

ARGUMENT.

Our contention is that the Oleomargarine Law is a separate distinct and independent system of legislation, complete within itself, and that Section 3177, Rev. Stats., does not apply to it. The Government's contention is that the Oleomargarine Law is merely amendatory of what it terms the General Internal Revenue Laws and that every provision of those laws (therefore Section 3177, Rev. Stats. U. S.) applies to the Oleomargarine Law. We

send out with this brief under separate cover a copy of the Oleomargarine Law. There are twenty comprehensive sections in the Oleomargarine Law. There are *declaratory* provisions, *remedial* provisions and *sanctional* provisions, all of which make the law stand out as an independent system of legislation, complete in every detail.

We quote from Section 3 of the Oleomargarine Law:

> "Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. *And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thrity-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one and thirty-two hundred and forty-three, of the Revised Statutes of the United States, are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the* **persons** *upon whom they are imposed:* Provided, further, that wholesale dealers who vend no other oleomargarine of butterine except that upon which a tax of one-fourth of one cent per pound is imposed by this act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this Act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars."

The court will notice that the above quoted section of the Oleomargarine Law reaches out and incorporates

into itself Sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240 and 3243 of the Revised States of the United States, so far as they are applicable. We suggest the *query* that if every provision of the so-called General Internal Revenue Laws (including Section 3177) applies to the Oleomargarine Law, then why the necessity of Congress in Section 3 of Oleomargarine Law reaching out and specifically incorporating into it certain enumerated sections of those General Revenue Laws?

In attempting to determine the applicability of Section 3177 to the Oleomargarine Law, we must not be unmindful of one of the axiomatic rules of statutory construction, that a part of a law can not be separated from its context for the purpose of construing it. Sections 3172, 3173, 3174, 3175, 3176 and 3177 are part of the Act of June 30, 1864. This part of the Act was divided into the above sections by the compilers. The Act of which the above sections are a part, was enacted for the purpose of securing the taxing of articles and commodities which were *not taxed* by the *affixing* of *stamps* by current tax laws.

Section 3172 provides that:

> "Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay a special tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate such objects." * * *

Section 3173 provides that it shall be the duty of any person, etc., made liable to any duty, special tax, stamp or tax imposed by law, *when not otherwise provided for,* to make a list or return verified by oath of the articles, etc., objects, wares, merchandise, etc., subject to tax. Provided, that if any person so liable shall fail to make such list, but shall consent to disclose the particulars of any and all property, goods, wares, merchandise, etc., then the collector may make such list or return, which being distinctly read, consented to, and signed and verified by oath by the person, shall be received as his list or return. The next proviso relates to service of notice in absence of party. Refusal or neglect to render such notice or return after notice given or the rendering of a false return makes it lawful for the collector to summon such person or any other person and may require the production of books and papers, and to do so may even go into a foreign collection district.

Section 3174 provides for the service of the summons provided for by Section 3173.

Section 3175 provides for hearings by a Court or Commissioner of a Circuit Court of the United States.

Section 3176 provides that the Collector shall enter into the premises, if it be necessary, of every person who has taxable property which he has refused to disclose as above provided for, or where a false or fraudulent return has been rendered, and from the best evidence he can obtain, including that derived from the examination provided for by the preceding sections, make a list or return of the objects liable to tax owned or possessed by such person. On this return the Commissioner of Internal Revenue makes the assessment, and if false or fraudulent statements have been made, he may add 100%. In case of neglect or refusal to make a list

or return, except in cases of sickness or absence, he shall add 50%.

It is manifest that Section 3177 does not stand entirely by itself. It was not enacted as a separate and distinct piece of revenue legislation; but it in fact is an indispensable part of the sections immediately preceding and following; in short, it can only receive proper interpretation by being studied in connection with its context; neither does it in terms amend any revenue law whatever; but rather, it complements other revenue laws by covering objects not covered by them. It is contended, however, that the Oleomargarine Law is amendatory of Section 3177, or of the General Revenue Laws, whatever that may mean. If by this, it is intended to seriously contend that because the Oleomargrine Law is a means of obtaining revenue, it is thus a revenue law, and therefore operates to amend every other revenue law, and is amended by every other revenue law, the argument is *reductio ad absurdum*. No authority whatever is quoted in support of the contention.

The above provisions of the Act of June 30, 1864, have been construed by the Courts, and we will now cite the cases which have construed these provisions:

ADJUDICATED CASES ON THE APPLICABILITY OF THESE PROVISIONS TO LEGISLATION **ANALOGOUS** TO OLEOMARGARINE LEGISLATION.

In the case of *In re* Archer, 9 Benedict, 428 (Fed. Cases, 506), where the revenue department was attempting to proceed under Sections 3172, 3173, 3174 and 3175 (part of the Act of June 30, 1864), against parties charged with violations of the Income Tax Law, the Court held that those sections did not apply to the Income Tax Law. The court pointed out the fact that the Statutes of the United States disclose at least two (2) distinct methods of taxation; (1) requires a return containing a list of objects liable to taxation, upon which return an assessment is made; (2) requires that the taxes be paid by license tax stamp or by stamp affixed to the taxable article. This latter method is deemed adequate for the collection of numerous taxes, without the requirement of any return or assessment. The Court held that the sections cited *supra* did not apply to taxes which are paid by means of a tax stamp. The court *In re* Archer case, cited *supra*, said:

> "The three sections above cited are part of a scheme looking solely to the assessment and collection of taxes through the machinery of assessment and collection by the warrant of the collector. This appears from the tenor of the three sections themselves and of 3172, and of the sections which follow Section 3175. Whether the case be one of neglect to render a return, or of the rendering of a

> false return, Section 3176 shows that the object of the examination of books and the taking of testimony under Section 3173, is to enable the Collector or Deputy Collector to make a correct list or return, and to enable the Commissioner of Internal Revenue to assess the tax on objects liable to tax. I do not think it is within the purview of the sections referred to, even including Section 3182, that unpaid income taxes are now to be assessed and collected through the machinery provided by those sections, or that the examinations which are solely a part of such machinery should now take place."

The above case is analogous to the case at bar, for the taxes imposed under the Oleomargarine Law, as in the Income Tax Law, are payable by *tax stamps* and not upon *assessments* on *returns* of *objects* liable to taxation.

SUCCESSION TAX LAW:

The question as to the applicability of Section 3176 to taxes imposed under the Succession Tax Law, arose in the case of Wright v. Blakeslee, 101 U. S., 174, which went to the Supreme Court of the United States, and that Court held that Section 3176 did not apply to the taxes imposed under the Succession Tax Law. The Court, on Page 174, says:

> "Another point made by the plaintiff against the assessment relates to the 50 per cent. added to the amount of the succession tax, and collected by way of penalty for refusing to make a return, as required by the statute. This penalty, we think, was erroneously imposed. The assessor evidently thought he was authorized to impose the penalty prescribed by the 14th section of the Act of 1864,

as amended by the Act of July 13, 1866, which was, it is true, a penalty of fifty per cent of the tax for refusing or neglecting to make the list or return. But an inspection of that section and of the context to which it belongs shows that it relates to the annual and monthly lists and *returns* to be made by the parties taxable under the law. So Section 118, as amended by the Act of March 1, 1867, which also imposes a penalty of fifty per cent. for such neglect or refusal, and was relied on by the Court below, related only to the income tax. But the penalty for failing to return and give notice of a succession tax is provided for in a distinct section, to-wit, Section 148 of the Act of 1864, as amended by the Act of 1866, which is found in immediate collation with the sections relating to the succession tax. This section declares that if any person required to give such notice should fail, neglect or refuse to do so within the time required by law, he should be liable to pay to the United States a sum equal to ten per cent upon the sum of the tax payable by him.

"This is the *specific remedy provided for the special case,* and necessarily excludes any other. We are satisfied, therefore, that the penalty of fifty per cent., which was actually imposed, was wrong, and it ought not to have been exacted."

If Section 3176, under the above authorities, does not apply to the *Succession Tax Law* or the *Income Tax Law,* it and its companion section certainly, through analogous reasoning, do not apply to the Oleomargarine Law, which is as complete a system of legislation, within itself, as the Income Tax Law or the Succession Tax Law.

VIEW CONGRESS HAS ITSELF TAKEN AS TO THE APPLICABILITY OF SPECIFIC PROVISIONS IN QUESTION TO ANALOGOUS REVENUE ACTS.

Congress has always regarded it as necessary, where it considered it desirable for the machinery of Section 3177 and the three preceding sections to apply to some new object of taxation, to specifically and in unmistakable terms so state.

THE WAR REVENUE ACT:

This Act of 1898 incorporated within itself the above sections by setting out in Section 31 thereof "that *all* administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act." (30 Stat. 466.)

INCOME TAX ACT:

Congress, even prior to the War Revenue Act, above set out, recognized the necessity of specifically extending the above sections to new objects of taxation which were imposed by statutes not supplemental, when it desired that the said machinery set out in said section should so apply, for by Section 34 of the Act of 28th of August, 1894 (28 Stat. 557), Congress amended the above sections so as to cover the income tax imposed by that act.

ACT TO REDUCE THE TARIFF:

Furthermore, the above act was an act to reduce the tariff. Section 36, at page 559 of said act, is as follows:

> "And that it shall be the duty of every corporation, company or association doing business for profit to keep full, regular and correct books of account, upon which all its transactions shall be entered from day to day, in regular order, and whenever any collector or deputy collector of the district in which any corporation, company or association is assessable shall believe that a true and correct return of the income of such corporation, company, or association has not been made, he shall make an affidavit of such belief and of the grounds on which it is founded, and file the same with the commissioner of internal revenue, and if said commissioner shall, on examination thereof, and after full warning upon notice given to all parties, conclude there is good ground for such belief he shall issue a request in writing to such corporation, company or association to permit an inspection of the books of such company, corporation or association by him; and if such company, corporation or association shall refuse to comply with such request, then the collector or deputy collector of the district shall make from such information as he can obtain an estimate of the amount of such income and then add fifty per cent thereto, which said assessment so made shall then be the lawful assessment of such income."

To enable this assessment so laid by Section 36 to be properly laid and legally collected, Congress reached out and took from Title XXXV of the internal revenue laws, Sections 3172, 3173 and 3176, and to make certain that no ambiguity should exist as the intention of Con-

gress to extend these sections to the act under consideration, the said sections, together with 3167, are set out as Section 34 and between quotation marks.

From the above it is clear that Congress did not intend the machinery of Sections 3173-4-5-6-7 to apply to the Oleomargarine Law, for if it had, it would have unmistakably indicated its intention.

ADJUDICATED CASES ON THE APPLICABILITY OF THE PROVISIONS IN QUESTION TO THE **OLEOMARGARINE LEGISLATION.**

Fortunately, the applicability of the part of the Act of June 30, 1864, of which Section 3177 is a part, to the Oleomargarine Law has been raised in five cases, two of which went to different circuit courts of appeal, the Sixth and Eighth, and in all of those cases the courts held that the Act of 1864 did not apply to the Oleomargarine Law. Those cases are:

In re Kearne, 64 Fed. Rep. 481.
In re Kinney, 102 Fed. Rep. 468.
Schafer v. Craft, 144 Fed. Rep. 908.
Craft v. Schafer, 153 Fed. Rep. 176; appeal of above case.
Craft v. Schafer, 82 C. C. A. Rep. 349.
Craft v. Schafer, on reconsideration, 154 Fed. Rep. ~~176~~ 100 ✓
Craft v. Schafer, on reconsideration, 83 C. C. A. Rep. 677.
Grier v. Tucker, 150 Fed. Rep. 658.
Tucker v. Grier, 160 Fed. Rep. 611; appeal of above case.
Tucker v. Grier, 87 C. C. A. 573

All of above cases being cited with approval in U. S. v. Lamson, 165 Fed. 83.

We will not quote from all these opinions, for it seems entirely unnecessary. The first opinion, *In re* Kearns, clearly sets out the point decided, but as the court in the second case, *In re* Kinney, 102 Fed. Rep. 468, quotes freely from the former, we will only cite directly from the latter case:

On Page 468, the Court said:

> "*In re Kearns* (D. C.), 64 Fed. Rep. 481, is a decision directly adverse to the collector's contention. Though that decision related to a wholesale dealer in oleomargarine, and not to a manufacturer, this distinction is immaterial, for the reasoning of the Court is equally applicable to the case of a dealer and of a manufacturer. In that case it was held that the Act of August 2, 1886, called the 'Oleomargarine Act,' was not a supplement to or amendment of other revenue legislation, but was a distinct and independent act, creating a complete and comprehensive system in itself, and fixing punishments for violations of its provisions. The title of the act 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' affords some support to this view. The learned Judge dwells chiefly upon the fact that the Act itself expressly enumerates in Section 3, certain provisions of the internal revenue laws, to-wit, Sections 3232 to 3241, inclusive, as well as Section 3243, as applicable to the special taxes imposed by Section 3, and to the persons upon whom they are imposed, and omits all reference to other general provisions of the internal revenue laws. The inquiry is then made: 'If Congress deemed

it necessary to specify such section of the internal revenue system to extend them to oleomargarine, how can its omission to extend Section 3173 be considered other than a deliberate declaration that it was not extended?' "

"Powers such as are conferred by Sections 3173 and 3175 are not to be extended by analogy, and must be strictly limited within the express terms of the statutes."

"It should be observed that Section 3173 does not apply generally to all objects of internal revenue taxation. The statutes of the United States disclose at least two distinct methods of taxation—one requires a return containing a list of objects liable to tax, upon which return an assessment is made, and the other method requires that the tax be paid by a stamp affixed to the taxable article. This latter method is deemed adequate for the collection of numerous taxes, without the requirement of any return or assessment. This distinction is recognized in the War Revenue Act (30 Stat., 450), wherein, after providing for certain returns, the statute says: 'The Commissioner of Internal Revenue shall assess and collect the taxes found to be due as other taxes not paid by stamps are assessed and collected.' "

"Furthermore, it seems improbable that, after enumerating in the Oleomargarine Law certain sections of the Revised Statutes and omitting any reference to Section 3173, it should be left to the Commissioner of Internal Revenue to decide whether Section 3173 should or should not be employed as a means of collecting a tax upon oleomargarine."

We refer the court to the reasoning of the courts in the cases above quoted.

THE PROVISIONS IN QUESTION FROM THEIR VERY NATURE HAVE NO APPLICATION TO TAXES IMPOSED UNDER OLEOMARGARINE LAW.

Section 3238 of the Revised Statutes of the United States is specifically incorporated in the Oleomargarine Law by the third provision thereof. Section 3238 of the Revised Statutes provides that special taxes shall be paid by *stamps* denoting the tax. Section 8 also provides for payment of tax imposed under that section by stamps.

Sections 3176 and 3177 on their face show that the Commissioner of Internal Revenue, under the authority therein contained, is *not* to make assessment for taxes which are *paid by stamps.*

Section 3176, in setting out the Commissioner's authority to make assesment under certain cases, says:

> "* * * And the Commissioner of Internal Revenue shall assess all taxes *not paid by stamps,* including the amount, if any, due for special tax, income or other tax, and in case of any return of a false or fraudulent list or valuation intentionally he shall add one hundred per centum to such tax," etc.

What better evidence could be wanted of the fact that Sections 3176 and 3177 are not to apply to taxes paid by stamp than the provision of the first section itself which gives the Commissioner the right to make assessment "on all taxes *not paid by stamps.*"

From the above it can be seen that under the authorities and the strict letter of the statutes, Section 3177 and the four preceding sections were not intended by Congress to apply to the special taxes paid by stamps such as are all taxes on oleomargarine.

OPPOSING COUNSEL'S SUGGESTION THAT DEPARTMENTAL CONSTRUCTION IS IN ACCORDANCE WITH CONTENTION THAT GENERAL INTERNAL REVENUE STATUTES APPLY IN OLEOMARGARINE CASES.

The term, "General Internal Revenue Statutes," is too broad. The sole question here is not the applicability of General Internal Revenue Statutes (whatever the term means) to Oleomargarine Law, but the applicability of Section 3177 to Oleomargarine Law. Opposing counsel in making this point are somewhat crudely stating a rule of law which evidently it is desired to invoke. The rule is correctly stated as follows:

That if the true construction of a statute be doubtful and two constructions are admissible, then the court should give weight to the construction given by those whose duty it has been to apply the statute. This rule is never applied where the *intention* of the law-making body is to be gathered from the act itself. The rule urged is not a controlling rule, but a rule which is only applicable where the construction of the statute is in doubt and some rule is needed to turn the evenly balanced scale. It has heretofore been shown in this brief and in defend-

ant in error's original brief, that it was the clear intention of the law-making body that Section 3177 should not apply to taxes imposed under the Oleomargarine Law.

It certainly can not be contended that the Commissioner of Internal Revenue can, by a construction which he places upon an act, extend a penal statute by implication. Penalties are never extended by implication.

> United States v. Harris, 177 U. S., 395.
> Elliott R. R. Co., 95 U. S., 573.
> Erskine R'y Co., 94 U. S. 619.
> Then Ben R., 134 Fed. Rep. 785 (C. C. A., 6th Circ).

The Supreme Court of the United States held, in the case of United States v. Eaton, 144 U. S. 677, where a regulation, made August 5, 1886, by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under Section 20 of the Act of August 2, 1886, c. 840 (24 Stat., 209), in relation to oleomargarine, required wholesale dealers to keep a book and make a monthly return, showing certain prescribed matters, that a wholesale dealer in the article who fails to comply with the said regulation is not liable to the penalty imposed by Section 18 of the act, because he does not omit or fail to do a thing required by law in the carrying on or conducting of his business.

The court in the foregoing case, said on page 687 (italicized for brief):

> "It was said by this court, in Morill v. Jones, 106 U. S., 466-467, that the Secretary of the Treasury

can not by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under section 2505 of the Revised Statutes, which provided that live animals imported for breeding purposes, from beyond the seas, should be admitted free of duty upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department," etc.

No mere omission or failure to provide for contingencies will justify judicial addition to a statute.

U. S. v. Goldenborg, 168 U. S. 103.
Glover v. U. S., 164 U. S. 295.
McKee v. U. S., 164 U. S. 287.

The construction of the tariff act by the Treasury Department was not conclusive upon either party, and the collector was not justified by such instructions in imposing duties not warranted by law.

Leming v. Marshall, 15 Fed. Cases, 8243, 3 Blatch., 125.
Balfour v. Sullivan, 17 Fed. Rep. 233.

Sections 3184 and 3185 of the Revised Statutes provide for assessments, and are in many respects similar

to Section 3176. It has been held that they must be *strictly* construed and *literally* followed.

U. S. v. Allen, 14 Fed. 263.

The construction given to the Internal Revenue Act by Commissioners of Internal Revenue, even though published, is not a construction of so much dignity that the re-enactment of the statute, subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction.

Dollar Savings Bank v. U. S., 19 Wall. 227.

Nor is there any force in the argument that "in case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive." There is *no ambiguity* in the Oleomargarine Law, and the Supreme Court of the United States made summary disposition of the ruling placed by the Treasury Department on the applicability of said Section 3176 to the Succession Tax Law, which it held provided a specific penalty necessarily exclusive.

Wright v. Blakeslee, 101 U. S. 174.

Opposing counsel make the point that the Oleomargarine Law contains inadequate provisions for its enforcement.

Their contention that without the machinery of those sections the due collection of the oleomargarine tax is impossible is little less than absurd. The Oleomargarine

Act is about as complete an act as can be imagined. It is declaratory, remedial and sanctionary. An examination of that law convinces one that it is a separate, distinct and independent system of legislation, complete within itself.

Section 19 of the act provides that all fines, penalties and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.

To contend that the remedies set out in that act are inadequate for the enforcement of it is to charge that relief can not be had in either the civil or criminal branches of the United States courts.

Congress itself has not considered that the machinery provided in the sections under question was necessary for the due administration of the Succession Tax Law, and the Supreme Court so held.

Wright v. Blakeslee, 101 U. S. 178.

After the court held in the case of *In re* Archer, 9 Benedict, 428, Fed. Cases, 506, that the said machinery of those sections did not apply in the administration of the Income Tax Law, Congress, many years later, when it felt that that machinery was desirable in the administration of the said Income Tax Law, specifically so enacted. Congress also did this with respect to the War Revenue Act, as has been pointed out above.

The failure of Congress, in the light of the above status of the matter, when it came to enact an Oleomargarine Law, which incorporated certain provisions of the so-called General Internal Revenue Laws into itself,

to incorporate the particular section under discussion, clearly evidenced an intention of Congress that said sections should not be applicable to the Oleomargarine Law.

We believe this conclusion can not be gotten away from.

We ask that this case be affirmed.

Respectfully submitted.

HENRY M. JOHNSON,
Attorney for Defendants in Error.

JOHNSON & HIEATT,
Of Counsel.

UNITED STATES *v.* BARNES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 565. Argued October 24, 1911.—Decided January 9, 1912.

The maxim *expressio unius est exclusio alterius* is a rule of construction and not of substantive law, and serves only as an aid in discovering legislative intent when not otherwise manifest.

The mention in the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209, § 3, of certain specified sections of the Revised Statutes, which relate to special taxes, as applicable to the special taxes imposed by § 3, may exclude other sections relating to special taxes but does not exclude as inapplicable to the collection of the taxes imposed by, and enforcement of, the Oleomargarine Act, § 3177, Rev. Stat., which is general in its terms, and relates to all articles and objects subject to internal revenue tax.

In view of the custom of embodying National legislation in codes and systematic collections of general rules, it is the settled rule of decision of this court that subsequent legislation upon a subject covered by a previous codification carries the implication that general rules are not superseded by such subsequent legislation except where it clearly appears.

Where there is a codification of revenue laws to prevent fraud, the inference is that subsequent legislation is auxiliary to the earlier, and only in case of manifest repugnancy will it be construed as an abrogation thereof. *Wood* v. *United States*, 16 Pet. 342, 363.

THE facts, which involve the construction of the Oleomargarine Act of 1886, and the applicability of § 3177, Rev. Stat., are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States:

Oleomargarine is an "article or object subject to tax" to which § 3177 of the Revised Statutes applies, and there is nothing in the Oleomargarine Act to warrant its exclusion.

By conferring special and limited authority upon the internal revenue officers in respect to the manufacture or

sale of oleomargarine, Congress cannot be held to have intended to deny them the ordinary powers possessed by them as revenue officers.

Clearly, in the absence of any provision in the Oleomargarine Act expressly or by clear implication negativing the view, these general powers and duties of the revenue officers must be held to apply in the enforcement of that act.

To hold otherwise is to say that the oleomargarine business alone is to be exempted from the necessary and salutary provisions of the law for the enforcement of internal revenue taxes and the prevention of fraud in respect thereto. *United States* v. *Fisher*, 2 Cranch, 386; *The Brig Ann*, 9 Cranch, 289.

The Oleomargarine Act of 1886, being a revenue act, *In re Kollock*, 165 U. S. 526, 536, should be construed together with the general statutes relating to collection of and the prevention of frauds upon the revenue, especially as it contains no adequate provisions on that subject and would be practically inoperative otherwise. *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21.

The departmental construction is that general internal revenue statutes apply in oleomargarine cases. T. D. Int. Rev., No. 1266; 26 Op. A. G. 282.

The construction given to a statute by those charged with the duty of executing it will be given great weight by the court if the true construction be doubtful. *United States* v. *Hammers*, 221 U. S. 220, 228.

The judicial construction of the statute is that general internal revenue statutes are applicable in oleomargarine cases. *United States* v. *Thomas Fitzsimmons*, Dis. C. U. S. for Dist. of Michigan (not reported); *Hastings* v. *Herold*, 184 Fed. Rep. 759; *Rosencrans* v. *United States*, 165 U. S. 257, 262.

The decisions cited in the opinion below are inapplicable or erroneous.

Mr. Henry M. Johnson for defendants in error:

In analogous cases, provisions of the Revised Statutes have been held inapplicable. *In re Archer*, 9 Benedict, 428.

As to the applicability of § 3176 to taxes imposed under the Succession Tax Law, see *Wright* v. *Blakeslee*, 101 U. S. 174.

Congress has always regarded it as necessary, where it considered it desirable for the machinery of § 3177 and the three preceding sections to apply to some new object of taxation, to so state specifically and in unmistakable terms. See the War Revenue Act, 30 Stat. 466, and Income Tax Act, § 34, Act August 28, 1894, 28 Stat. 557, § 36 of same act on p. 559.

The applicability of the part of the act of June 30, 1864, of which § 3177 is a part, to the Oleomargarine Law has been raised in five cases, two of which went to different Circuit Courts of Appeal, sixth and eighth circuits, and in all of those cases the courts held that the act of 1864 did not apply to the Oleomargarine Law. See *In re Kearne*, 64 Fed. Rep. 481; *In re Kinney*, 102 Fed. Rep. 468; *Schafer* v. *Craft*, 144 Fed. Rep. 908; *S. C.*, on appeal, 153 Fed. Rep. 176; *S. C.*, on reconsideration, 154 Fed. Rep. 1002; *Grier* v. *Tucker*, 150 Fed. Rep. 658; *S. C.*, on appeal, 160 Fed. Rep. 611. All of above cases were cited with approval in *United States* v. *Lamson*, 165 Fed. Rep. 83.

The provisions in question from their very nature have no application to taxes imposed under the Oleomargarine Law.

Even if departmental construction is in accordance with the contention that general internal revenue statutes apply in oleomargarine cases, the rule of giving weight to the construction given by those whose duty it has been to apply the statute is never applied where the intention of the law-making body is to be gathered from the act itself. The rule urged is not a controlling rule, but a rule which is only applicable where the construction of

the statute is in doubt and some rule is needed to turn the evenly balanced scale.

Here it is evident that it was the clear intention of the law-making body that § 3177 should not apply to taxes imposed under the Oleomargarine Law.

The Commissioner of Internal Revenue cannot, by a construction which he places upon an act, extend a penal statute by implication. Penalties are never extended by implication. *United States* v. *Harris*, 177 U. S. 395; *Elliott* v. *Railroad Co.*, 95 U. S. 573; *Erskine* v. *Railway Co.*, 94 U. S. 619; *The Ben R.*, 134 Fed. Rep. 785; *United States* v. *Eaton*, 144 U. S. 677.

No mere omission or failure to provide for contingencies will justify judicial addition to a statute. *United States* v. *Goldenberg*, 168 U. S. 103; *Glover* v. *United States*, 164 U. S. 295; *McKee* v. *United States*, 164 U. S. 287.

The construction of a tariff act by the Treasury Department is not conclusive upon either party, and the collector is not justified by such instructions in imposing duties not warranted by law. *Leming* v. *Marshall*, 15 Fed. Cases, 8243; *Balfour* v. *Sullivan*, 17 Fed. Rep. 233; and see also *United States* v. *Allen*, 14 Fed. Rep. 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *Wright* v. *Blakeslee*, 101 U. S. 174.

The Oleomargarine Law contains adequate provisions for its enforcement, and the failure of Congress, when it incorporated certain provisions of the so-called general internal revenue laws into the Oleomargarine Act, to incorporate § 3177, clearly evidenced an intention of Congress that said section should not be applicable.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The sole question presented for decision by this writ of error is, whether Rev. Stat., § 3177, is applicable to the col-

lection or enforcement of the specific tax imposed on oleomargarine by the act of August 2, 1886, c. 840, 24 Stat. 209. In the District Court a negative answer to the question was given, and an indictment drawn and returned upon the contrary view was held bad upon demurrer. To a right appreciation of the question it is essential that a brief outline be given of the internal revenue laws, of which § 3177 is a part, and of the later Oleomargarine Act.

Title XXXV of the Revised Statutes is a codification and consolidation, according to an orderly arrangement, of all the then existing laws relating to internal revenue. It is subdivided into chapters, each embracing cognate sections bearing upon a particular branch of the general subject. The first two chapters, one dealing with the officers of internal revenue and the other with assessments and collections, are, with minor exceptions, general in their terms and application. The third chapter deals with "special taxes" exacted of those who engage in designated classes of business, such as rectifying or selling distilled spirits and manufacturing or selling cigars; other chapters deal separately with specific taxes imposed upon particular articles or objects, such as distilled spirits and cigars, and the final chapter comprises provisions common to several objects of taxation. Section 3177 is a part of the second chapter, dealing with assessments and collections, and reads:

"Any collector, deputy collector, or inspector may enter, in the day-time, any building or place where *any articles or objects subject to tax* are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers

may enter them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court."

It will be perceived that the section is comprehensive in its terms and evidently designed to promote the enforcement of the revenue laws as to "any articles or objects subject to tax."

The act of August 2, 1886, is a revenue law of the same class as those embodied in Title XXXV of the Revised Statutes. It imposes a specific tax on oleomargarine and "special taxes" on those who engage in its manufacture or sale, and contains several administrative and penal provisions. But it does not purport to be independent of other legislation or complete in itself. On the contrary, it plainly contemplates the existence of an established system of revenue laws to which resort shall be had in carrying it into effect. Section 3, which imposes the special taxes, declares that §§ 3232 to 3241, and 3243, of the Revised Statutes "are, so far as applicable, made to extend to . . . the *special taxes imposed by this section*, and to the persons upon whom *they* are imposed."

It is the express extension of those sections to the special taxes imposed by the Oleomargarine Act which gives rise to the question before stated. The position taken by the defendants in error, and sustained by the District Court, is, that that extension of particular sections is an implied exclusion of all others. *Expressio unius est exclusio alterius.*

We are unable to assent to that position. The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not. In the instance now before us too much is claimed for it. The sections named in § 3 of the Oleomargarine Act are a part of chapter 3 of Title XXXV of the Revised Statutes. They relate exclusively to special taxes and are so restricted in their terms that it is at least doubtful that they could be applied to any special taxes not imposed by that chapter, unless expressly extended to them. To illustrate, § 3232, which precedes the others and is more or less a key to their meaning, declares: "No person shall be engaged in or carry on any trade or business *hereinafter mentioned* until he has paid a special tax therefor in the manner *hereinafter provided.*" On the other hand, the sections in chapters 1 and 2 are, with minor exceptions, so general in their terms as to leave no doubt of their applicability to taxes imposed by subsequent legislation containing no provision to the contrary. In other words, the difference between the sections named and those in chapters 1 and 2 discloses an occasion for affirmatively extending the operation of the former and no occasion for mentioning the latter. It also is apparent that the Oleomargarine Act will measurably fail of its purpose if the general provisions of chapters 1 and 2 are not applicable to the taxes which it imposes; for, as before indicated, it does not in itself provide a complete or effective scheme for their enforcement. Neither does it contain any provision for the redress of those from whom such taxes are erroneously or illegally exacted, although the settled policy of the Government long has been to afford relief from all such exactions, as is shown by §§ 3220, 3226, 3227 and 3228 in chapter 2. These omissions are cogent evidence that it is intended that recourse shall be had to the

general provisions of chapters 1 and 2, save as in the Oleomargarine Act it may be provided otherwise.

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood* v. *United States*, 16 Pet. 342, 363, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: "And it may be added that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the custom-house officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary inference in all such cases is, that the legislature intends the new laws to be auxiliary to, and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former." In *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21, it was said, in disposing of a like

question: "It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." And in *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167, where the question was, whether general statutes defining the powers of the officers of the Land Department were applicable to a grant of public lands by a subsequent act of Congress, it was said: "While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

We conclude that, while the express extension of particular sections in chapter 3, dealing with special taxes, to the like taxes imposed by § 3 of the Oleomargarine Act may operate as an implied exclusion of the other sections in that chapter, it does not in any wise restrict or affect the operation of any of the general sections in chapters 1 and 2. And as § 3177 is a part of chapter 2, is general in its terms, and does not appear to be repugnant to any provision in the Oleomargarine Act, we think the ques-

tion first above stated must be answered in the affirmative.

The cases of *Craft* v. *Schafer*, 154 Fed. Rep. 1002; *Tucker* v. *Grier*, 160 Fed. Rep. 611, and *Hastings* v. *Herold*, 184 Fed. Rep. 759, although not involving § 3177, disclose some contrariety of opinion in the lower Federal courts upon the matter principally discussed herein, and we deem it appropriate to observe that our conclusion has been reached only after a careful consideration of those cases.

Reversed.